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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 PAULA M. WALES,  
8 Plaintiff,

NO: 1:16-CV-3224-TOR

9 v.

ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT

10 COMMISSIONER OF SOCIAL  
SECURITY ADMINISTRATION,

11 Defendant.

12  
13 BEFORE THE COURT are the parties' cross motions for summary  
14 judgment (ECF Nos. 15, 16). The Court has reviewed the administrative record  
15 and the parties' completed briefing and is fully informed. For the reasons  
16 discussed below, the Court **GRANTS** Defendant's motion and **DENIES** Plaintiff's  
17 motion.

18 **JURISDICTION**

19 The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g),  
20 1383(c)(3).

## STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under §405(g) is limited: the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012) (citing 42 U.S.C. § 405(g)). "Substantial evidence" means relevant evidence that "a reasonable mind might accept as adequate to support a conclusion." *Id.*, at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether this standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court "may not reverse an ALJ's decision on account of an error that is harmless." *Id.* at 1111. An error is harmless "where it is inconsequential to the [ALJ's] ultimate nondisability determination." *Id.* at 1115 (quotation and citation omitted).

1 The party appealing the ALJ's decision generally bears the burden of establishing  
2 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

### 3 **FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

4 A claimant must satisfy two conditions to be considered "disabled" within  
5 the meaning of the Social Security Act. First, the claimant must be "unable to  
6 engage in any substantial gainful activity by reason of any medically determinable  
7 physical or mental impairment which can be expected to result in death or which  
8 has lasted or can be expected to last for a continuous period of not less than twelve  
9 months." 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant's impairment must be  
10 "of such severity that he is not only unable to do his previous work[,] but cannot,  
11 considering his age, education, and work experience, engage in any other kind of  
12 substantial gainful work which exists in the national economy." 42 U.S.C.  
13 § 1382c(a)(3)(B).

14 The Commissioner has established a five-step sequential analysis to  
15 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R.  
16 § 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant's  
17 work activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in  
18 "substantial gainful activity," the Commissioner must find that the claimant is not  
19 disabled. 20 C.F.R. § 416.920(b).

1        If the claimant is not engaged in substantial gainful activities, the analysis  
2 proceeds to step two. At this step, the Commissioner considers the severity of the  
3 claimant's impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from  
4 "any impairment or combination of impairments which significantly limits [his or  
5 her] physical or mental ability to do basic work activities," the analysis proceeds to  
6 step three. 20 C.F.R. § 416.920(c). If the claimant's impairment does not satisfy  
7 this severity threshold, however, the Commissioner must find that the claimant is  
8 not disabled. *Id.*

9        At step three, the Commissioner compares the claimant's impairment to  
10 several impairments recognized by the Commissioner to be so severe as to  
11 preclude a person from engaging in substantial gainful activity. 20 C.F.R.  
12 § 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the  
13 enumerated impairments, the Commissioner must find the claimant disabled and  
14 award benefits. 20 C.F.R. § 416.920(d).

15        If the severity of the claimant's impairment does meet or exceed the severity  
16 of the enumerated impairments, the Commissioner must pause to assess the  
17 claimant's "residual functional capacity." Residual functional capacity ("RFC"),  
18 defined generally as the claimant's ability to perform physical and mental work  
19 activities on a sustained basis despite his or her limitations (20 C.F.R.  
20 § 416.945(a)(1)), is relevant to both the fourth and fifth steps of the analysis.

1       At step four, the Commissioner considers whether, in view of the claimant's  
2 RFC, the claimant is capable of performing work that he or she has performed in  
3 the past ("past relevant work"). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is  
4 capable of performing past relevant work, the Commissioner must find that the  
5 claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of  
6 performing such work, the analysis proceeds to step five.

7       At step five, the Commissioner considers whether, in view of the claimant's  
8 RFC, the claimant is capable of performing other work in the national economy.  
9 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner  
10 must also consider vocational factors such as the claimant's age, education and  
11 work experience. *Id.* If the claimant is capable of adjusting to other work, the  
12 Commissioner must find that the claimant is not disabled. 20 C.F.R.  
13 § 416.920(g)(1). If the claimant is not capable of adjusting to other work, the  
14 analysis concludes with a finding that the claimant is disabled and is therefore  
15 entitled to benefits. *Id.*

16       The claimant bears the burden of proof at steps one through four above.  
17 *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1222 (9th Cir. 2009). If the  
18 analysis proceeds to step five, the burden shifts to the Commissioner to establish  
19 that (1) the claimant is capable of performing other work; and (2) such work  
20 "exists in significant numbers in the national economy." 20 C.F.R.

1 § 416.960(c)(2); *Bray*, 554 F.3d at 1222.

2 **BACKGROUND**

3 This is Plaintiff's second application for supplemental security income  
4 benefits. Plaintiff first applied for benefits on September 2, 2011. Tr. 73. Plaintiff  
5 was denied initially and upon reconsideration. Tr. 73. Plaintiff filed a written  
6 request for a hearing, which was held on February 14, 2013 before Administrative  
7 Law Judge (ALJ). Tr. 73. The ALJ denied benefits, Tr. 81, and Plaintiff did not  
8 appeal that decision.

9 Plaintiff filed for benefits again on May 30, 2013, alleging an onset date of  
10 April 18, 2008. Tr. 12. Plaintiff's claim was denied initially and upon  
11 reconsideration. Tr. 12. Plaintiff filed a written request for a hearing, which was  
12 held on February 3, 2015 before another ALJ. Tr. 19. The ALJ found no grounds  
13 for reopening the prior decision and thus limited the relevant period for the  
14 decision beginning on May 19, 2013. Tr. 12. At the hearing, Plaintiff amended  
15 the onset date of disability to May 30, 2013. Tr. 12. The ALJ found the claimant  
16 had not established a changed circumstance as is required to overcome the  
17 presumption of disability triggered by the initial denial of benefits, but continued  
18 with the sequential analysis in light of additional evidence not considered in the  
19 prior decision. Tr. 12. The ALJ ultimately denied relief based on a finding of non-  
20 disability in a decision dated July 10, 2015. Tr. 19.

1 At step one, the ALJ found that Plaintiff has not engaged in substantial  
2 gainful activity since May 30, 2013, the application date. Tr. 14. At step two, the  
3 ALJ found that Plaintiff had the following severe impairment: migraine headaches.  
4 Tr. 14. At step three, the ALJ found that Plaintiff does not have an impairment or  
5 combination of impairments that meets or medically equals a listed impairment.  
6 Tr. 15. The ALJ then concluded:

7 Plaintiff had the RFC to perform a full range of work at all exertional levels  
8 but with the following non-exertional limitations: the claimant can  
9 occasionally climb ramps and stairs, but never climb ladders, ropes and  
10 scaffolds, can frequently balance, stoop, kneel, crouch and crawl, and must  
avoid concentrated exposure to hazards such as dangerous moving  
machinery and heights.

11 Tr. 16. At step four, the ALJ found Plaintiff is capable of performing past relevant  
12 work. Tr. 18. On that basis, the ALJ concluded that Plaintiff was not disabled as  
13 defined in the Social Security Act. Tr. 26.

14 Plaintiff thereafter filed a request for review with the Appeal's Council,  
15 which was denied. Tr. 1. The ALJ's decision became the final decision of the  
16 Commissioner. 20 C.F.R. §§ 404.981, 422.201.

## 17 ISSUES

18 Plaintiff raises three issues for review:

- 19 1. Did the ALJ err in failing to indicate whether she specifically considered  
20 Listing 11.03 in determining whether Plaintiff's migraine headaches did  
not medically equal the criteria of any listed impairment?

2. Did the ALJ err in rejecting Plaintiff's symptom testimony?

3. Did the ALJ err in weighing the medical opinions in the record?

ECF No. 15 at 5-6.

## DISCUSSION

### A. Listing 11.03

Plaintiff argues the ALJ erred in failing to specifically discuss whether Plaintiff's symptoms met or equaled Listing 11.03. The Court disagrees. While the ALJ did not specifically mention Listing 11.03 – the most analogous listing to claimants suffering from migraines – such specificity is not required where the claimant does not posit such equivalence. *Lewis v. Apfel*, 236 F.3d 503, 514 (9th Cir. 2001); *Edwards v. Colvin*, 2014 WL 7156846, at \*3 (W.D. Wash., 2014). Plaintiff was represented by experienced counsel at the hearing, but neither Plaintiff nor Plaintiff's counsel mentioned Listing 11.03, let alone argued why it applies. Plaintiff has not otherwise demonstrated that such a listing was specifically suggested to the ALJ. Accordingly, the ALJ was not required to specifically review Listing 11.03 and further explain why it did not apply.

Moreover, a “finding of equivalence must be based on medical evidence only.” *Id.* (citing 20 C.F.R. § 404.1529(d)(3)). The medical records only mention slight or moderate limitations and do not include any medical determination that Plaintiff’s migraines are as severe and frequent as Plaintiff claimed at her hearing.



1 Specifically, Plaintiff’s claim that she is bed-ridden at least once a week – the crux  
2 of Plaintiff’s argument that she meets Listing 11.03 – is only supported by her  
3 discounted testimony. Accordingly, Plaintiff had not presented sufficient medical  
4 evidence that would even conceivably demonstrate that she equaled Listing 11.03.

### 5 B. Credibility

6 In social security proceedings, a claimant must prove the existence of  
7 physical or mental impairment with “medical evidence consisting of signs,  
8 symptoms, and laboratory findings.” 20 C.F.R. §§ 416.908; 416.927. As long as  
9 the impairment “could reasonably be expected to produce [the] symptoms,” the  
10 claimant may offer a subjective evaluation as to the severity of the impairment.  
11 *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991) (en banc). If an ALJ finds  
12 the claimant’s subjective assessment unreliable, “the ALJ must make a credibility  
13 determination with findings sufficiently specific to permit [a reviewing] court to  
14 conclude that the ALJ did not arbitrarily discredit claimant's testimony.” *Thomas*  
15 *v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002).

16 If there is no evidence of malingering, the ALJ’s reasons for discrediting the  
17 claimant’s testimony must be “specific, clear and convincing.” *Chaudhry v.*  
18 *Astrue*, 688 F.3d 661, 672 (9th Cir. 2012) (quotation and citation omitted). In  
19 making this determination, the ALJ may consider, *inter alia*: (1) the claimant’s  
20 reputation for truthfulness; (2) inconsistencies in the claimant’s testimony or

1 between his testimony and his conduct; (3) the claimant's daily living activities;  
2 (4) the claimant's work record; and (5) testimony from physicians or third parties  
3 concerning the nature, severity, and effect of the claimant's condition. *Id.* The  
4 ALJ "must specifically identify the testimony she or he finds not to be credible and  
5 must explain what evidence undermines the testimony." *Holohan v. Massanari*,  
6 246 F.3d 1195, 1208 (9th Cir. 2001).

7 Plaintiff argues the ALJ failed to give sufficient reasoning in finding  
8 Plaintiff was not entirely credible. However, the ALJ provided a clear and  
9 convincing reason supported by substantial evidence for finding Plaintiff not  
10 credible. The ALJ concluded that Plaintiff's records were inconsistent with her  
11 testimony given the alleged severity and continuity of the complained of symptoms  
12 in contrast with the limited and otherwise non-existent complaints found in the  
13 relevant medical records. Plaintiff cites eight medical records relevant to the  
14 disability determination, ECF No. 15 at 13, and each record supports the ALJ's  
15 finding that the medical record does not comport with Plaintiff's representation of  
16 severe, limiting pain. Tr. 450 ("patient presents with neck pain and headaches . . .  
17 which are not present today."); Tr. 502 ("in no acute distress"); Tr. 509-11  
18 ("medications continue to provide good pain relief without significant side  
19 effects"; patient "in no acute distress."); Tr. 513-14 (Plaintiff in no acute distress;  
20 noting Plaintiff had overused prescribed medication – discussed safe usage of her

1 medications, “no tolerance for any inappropriate behavior.”); Tr. 520 (denying  
2 dizziness and headache); Tr. 525 (complaints of “terrible” headache attributed to  
3 influenza; denying nausea); Tr. 531 (noting history of vertigo and migraines  
4 without mentioning current complaint of such); Tr. 538 (Plaintiff denying  
5 symptoms other than pain from tooth; noting history of migraines without any  
6 complaint related to headaches or migraine).

7         Given the dearth of medical record presenting even a modicum of support  
8 for Plaintiff’s claimed, severe limitations, the ALJ reasonably surmised that such a  
9 significant lack of medical notes on the subject contradicted Plaintiff’s  
10 representation of the severity. The record fully supports this finding and it is a  
11 clear and convincing reason for discrediting Plaintiff’s testimony. *Burch v.*  
12 *Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005) (Minimal objective findings can  
13 undermine a claimant’s credibility).

#### 14         **C. Review of Medical Opinions**

15         A treating physician’s opinions are generally entitled to substantial weight in  
16 social security proceedings. *Bray*, 554 F.3d at 1228 (citation omitted); *Orn v.*  
17 *Astrue*, 495 F.3d 625, 631 (9th Cir. 2007) (“By rule, the Social Security  
18 Administration favors the opinion of a treating physician over non-treating  
19 physicians.”) (citing 20 C.F.R. § 404.1527)). “[I]f a treating physician’s opinion is  
20 ‘well-supported by medically acceptable clinical and laboratory diagnostic

1 techniques and is not inconsistent with the other substantial evidence in the case  
2 record, it will be given controlling weight.” *Orn*, 495 F.3d at 631 (quoting 20  
3 C.F.R. § 404.1527(d)(2)) (brackets omitted). “To reject an uncontradicted opinion  
4 of a treating or examining doctor, an ALJ must state clear and convincing reasons  
5 that are supported by substantial evidence. If a treating or examining doctor’s  
6 opinion is contradicted by another doctor’s opinion, an ALJ may only reject it by  
7 providing specific and legitimate reasons that are supported by substantial  
8 evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005) (citation  
9 omitted).

10 Plaintiff argues the ALJ erred in giving deference to the opinion of Dr.  
11 Devita over the opinion of Dr. Jackson, the latter of which the ALJ assigned little  
12 weight. Tr. 18. Dr. Jackson opined that Plaintiff is limited to sedentary work, but  
13 suggested Plaintiff see an expert (*i.e.*, Dr. Devita). Tr. 18. Plaintiff followed the  
14 recommendation and saw Dr. Devita, a neurological specialist, who opined that the  
15 claimant is able to work in a full time capacity on a continuing basis without  
16 specific restrictions. Tr. 17.

17 Dr. Devita and Dr. Jackson gave contradicting opinion, so the ALJ need only  
18 provide a specific and legitimate reason for assigning either opinion less weight.  
19 Siding with an expert over a general physician is a specific and legitimate reason.  
20 The ALJ did not err in discounting Dr. Jackson’s opinion in lieu of discounting Dr.

1 Devita's contradicting opinion. Plaintiff argues Dr. Devita's opinion is mistaken  
2 based on Plaintiff's own research, but this approach is unpersuasive.

3 Moreover, even if the ALJ adopted the conflicting opinion of Dr. Jackson,  
4 the conclusion would not change. At the hearing, the ALJ asked the vocational  
5 expert to consider the limitations proposed by Dr. Jackson. The vocational expert  
6 and the ALJ found that Plaintiff would still be able to return to her former position  
7 notwithstanding the additional limitation to sedentary work. Tr. 18–19. Thus, any  
8 alleged error in adopting Dr. Devita's opinion over Dr. Jackson is harmless.

9 **IT IS HEREBY ORDERED:**

10 1. Plaintiff's Motion for Summary Judgment (ECF No. 15) is **DENIED**.

11 2. Defendant's Motion for Summary Judgment (ECF No. 16) is

12 **GRANTED.**

13 The District Court Executive is hereby directed to file this Order, enter  
14 Judgment for Defendant, provide copies to counsel, and **CLOSE** the file.

15 **DATED** September 19, 2017.



*Thomas O. Rice*  
THOMAS O. RICE

Chief United States District Judge